UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

TATIANA A.,[1] Plaintiff, vs. ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY, Defendant.	No. 2:19-cv-00349-MKD ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ECF Nos. 14, 16

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 14, 16. The parties consented to proceed before a magistrate judge. ECF No. 7. The Court, having reviewed the administrative record and the parties' briefing,

[1] To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

is fully informed. For the reasons discussed below, the Court denies Plaintiff's motion, ECF No. 14, and grants Defendant's motion, ECF No. 15.

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id*. at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are

supported by inferences reasonably drawn from the record." *Molina v. Astrue,* 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an ALJ's decision on account of an error that is harmless." *Id*. An error is harmless "where it is inconsequential to the [ALJ's] ultimate nondisability determination." *Id*. at 1115 (quotation and citation omitted). The party appealing the ALJ's decision generally bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

FIVE-STEP EVALUATION PROCESS

A claimant must satisfy two conditions to be considered "disabled" within the meaning of the Social Security Act. First, the claimant must be "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant's impairment must be "of such severity that he is not only unable to do his previous work[,] but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. § 1382c(a)(3)(B).

The Commissioner has established a five-step sequential analysis to determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §

416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's work activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(b).

If the claimant is not engaged in substantial gainful activity, the analysis proceeds to step two. At this step, the Commissioner considers the severity of the claimant's impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from "any impairment or combination of impairments which significantly limits [his or her] physical or mental ability to do basic work activities," the analysis proceeds to step three. 20 C.F.R. § 416.920(c). If the claimant's impairment does not satisfy this severity threshold, however, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(c).

At step three, the Commissioner compares the claimant's impairment to severe impairments recognized by the Commissioner to be so severe as to preclude a person from engaging in substantial gainful activity. 20 C.F.R. § 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the enumerated impairments, the Commissioner must find the claimant disabled and award benefits. 20 C.F.R. § 416.920(d).

If the severity of the claimant's impairment does not meet or exceed the severity of the enumerated impairments, the Commissioner must pause to assess

the claimant's "residual functional capacity." Residual functional capacity (RFC), defined generally as the claimant's ability to perform physical and mental work activities on a sustained basis despite his or her limitations, 20 C.F.R. § 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

At step four, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing work that he or she has performed in the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of performing such work, the analysis proceeds to step five.

At step five, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing other work in the national economy. 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner must also consider vocational factors such as the claimant's age, education and past work experience. 20 C.F.R. § 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis concludes with a finding that the claimant is disabled and is therefore entitled to benefits. 20 C.F.R. § 416.920(g)(1).

The claimant bears the burden of proof at steps one through four above. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five, the burden shifts to the Commissioner to establish that (1) the claimant is capable of performing other work; and (2) such work "exists in significant numbers in the national economy." 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

ALJ'S FINDINGS

On June 23, 2016, Plaintiff applied for Title XVI supplemental security income benefits alleging a disability onset date of June 1, 2016.[2] Tr. 70, 231-32. The application was denied initially, and on reconsideration. Tr. 102-10; Tr. 114-20. Plaintiff appeared before an administrative law judge (ALJ) on May 14, 2018. Tr. 39-69. On July 26, 2018, the ALJ denied Plaintiff's claim. Tr. 12-35.

At step one of the sequential evaluation process, the ALJ found Plaintiff has not engaged in substantial gainful activity since June 23, 2016. Tr. 17. At step two, the ALJ found that Plaintiff has the following severe impairments: double jointed hips; sacroiliac joint dysfunction; ligament tightness and muscle spasm; bilateral pars interarticularis defects at L5 with only very subtle anterolisthesis of

[2] At the hearing, Plaintiff agreed to amend her alleged onset date to June 23, 2016, Tr. 46, however the ALJ's decision refers to June 1, 2016 as the alleged onset date.

L5 on S1; right knee patellofemoral syndrome; polyarthralgias; migraine headaches; asthma; obstructive sleep apnea; chronic fatigue/pain; morbid obesity; depression; and anxiety. Tr. 18.

At step three, the ALJ found Plaintiff does not have an impairment or combination of impairments that meets or medically equals the severity of a listed impairment. Tr. 19-21. The ALJ then concluded that Plaintiff has the RFC to perform light work with the following limitations:

> [Plaintiff] has the ability to lift and/or carry up to 20 pounds occasionally (up to 1/3 of [the] workday), and 10 pounds frequently (up to 2/3 of the workday). [Plaintiff] has the ability to sit up to 6 hours, and stand and/or walk up to 2 hours. [Plaintiff] has the unlimited ability to push and/or pull, other than as stated for lift carry, with left lower extremity limited to occasionally. Regarding postural abilities, [Plaintiff] has the ability to occasionally stoop (i.e., bend at the waist); frequently climb ramps or stairs, or balance, but should never kneel, crouch (i.e., bend at the knees), crawl or climb ladders, ropes or scaffolds. Regarding use of hands, [Plaintiff] has the unlimited ability to handle, finger or feel. [Plaintiff] has the unlimited ability to reach in all directions, including overhead. [Plaintiff] has the unlimited ability to see, hear and communicate. Regarding the environment, [Plaintiff] has no limitations regarding exposure to extreme cold, extreme heat or noise; should avoid concentrated exposure to wetness, humidity, vibration and hazards, such as dangerous machinery and unprotected heights; and should avoid even moderate exposure to fumes, odors, dust, gases or poor ventilation. Regarding mental abilities, [Plaintiff] has the ability to understand, remember or apply information that is simple, routine, and repetitive, commensurate with 1 to 3 step tasks. Regarding interaction with others, [Plaintiff] would work best in an environment in proximity to, but not close cooperation, with co-workers and supervisors, and should work in an environment away from the public. Regarding the ability to concentrate, persist or maintain pace, [Plaintiff] has the ability, with legally required breaks, to focus attention on work

> activities and stay on task at a sustained rate; complete tasks in a timely manner; sustain an ordinary routine; regularly attend work; and work a full day without needing more than the allotted number or length of rest periods. Regarding the ability to adapt or manage, [Plaintiff] would work best in an environment that is routine and predictable, but does not have the ability to respond appropriately, distinguish between acceptable and unacceptable work performance; or be aware of normal hazards and take appropriate precautions.

Tr. 21-22.

At step four, the ALJ found Plaintiff has no past relevant work. Tr. 31. At step five, the ALJ found that, considering Plaintiff's age, education, work experience, RFC, and testimony from the vocational expert, there were jobs that existed in significant numbers in the national economy that Plaintiff could perform, such as small parts assembler, collator operator, and marker II. Tr. 29. Therefore, the ALJ concluded Plaintiff was not under a disability, as defined in the Social Security Act, from the date of the application through the date of the decision. *Id.*

On August 26, 2019, the Appeals Council denied review of the ALJ's decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying her supplemental security income benefits under Title XVI of the Social Security Act. Plaintiff raises the following issues for review:

1. Whether the ALJ properly evaluated the medical opinion evidence;

2. Whether the ALJ conducted a proper step-three analysis;

3. Whether the ALJ properly evaluated Plaintiff's symptom claims; and

4. Whether the ALJ properly developed the record.

ECF No. 14 at 2.

DISCUSSION

A. Medical Opinion Evidence

Plaintiff contends the ALJ erred in considering the opinions of consultative examiner Jenifer Schultz, Ph.D., non-examining medical expert Stephen Rubin, Ph.D., and State agency medical consultants Michael Brown, Ph.D., and John Gilbert, Ph.D. ECF No. 14 at 4-10.

There are three types of physicians: "(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant [but who review the claimant's file] (nonexamining [or reviewing] physicians)." *Holohan v. Massanari,* 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted). Generally, a treating physician's opinion carries more weight than an examining physician's, and an examining physician's opinion carries more weight than a reviewing physician's. *Id.* at 1202. "In addition, the regulations give more weight to opinions that are explained than to those that are not, and to the opinions of

specialists concerning matters relating to their specialty over that of nonspecialists." *Id*. (citations omitted).

If a treating or examining physician's opinion is uncontradicted, the ALJ may reject it only by offering "clear and convincing reasons that are supported by substantial evidence." *Bayliss v. Barnhart,* 427 F.3d 1211, 1216 (9th Cir. 2005). "However, the ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory and inadequately supported by clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009) (internal quotation marks and brackets omitted). "If a treating or examining doctor's opinion is contradicted by another doctor's opinion, an ALJ may only reject it by providing specific and legitimate reasons that are supported by substantial evidence." *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81 F.3d 821, 830-831 (9th Cir. 1995)). The opinion of a nonexamining physician may serve as substantial evidence if it is supported by other independent evidence in the record. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

1. Dr. Schultz

In September 2016, Dr. Schultz conducted a psychological consultative examination and diagnosed Plaintiff with PTSD with panic attacks, and chronic, moderate major depressive disorder. Tr. 553. Dr. Schultz opined Plaintiff has a guarded prognosis, she is not capable of managing funds, she is capable of

reasoning and understanding "to some degree" but appears to have some cognitive difficulty, she has interpersonal challenges which would affect her ability to work with others and be consistent in attendance to work, and her impaired concentration impacts her ability to learn. Tr. 553-54. The ALJ gave Dr. Schultz's opinion little weight. Tr. 28. As Dr. Schultz's opinion is contradicted by the opinions of Dr. Brown, Tr. 80-81, and Dr. Gilbert, Tr. 96-98, the ALJ was required to give specific and legitimate reasons, supported by substantial evidence, to reject Dr. Schultz's opinion. *See Bayliss*, 427 F.3d at 1216.

First, the ALJ found the opinion is overly reliant on Plaintiff's self-report. Tr. 31. A medical opinion may be rejected by the ALJ if it was inadequately supported by medical findings and based too heavily on the claimant's properly discounted complaints. *Bray*, 554 F.3d at 1228; *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). The ALJ noted Dr. Schultz opined Plaintiff has some cognitive difficulties based on Plaintiff's self-report of having previously had an individualized education plan, though Dr. Schultz did not review Plaintiff's educational records. Tr. 31. Dr. Schultz also opined Plaintiff has social limitations, and in the paragraph explaining Plaintiff's social limitations, Dr. Schultz noted Plaintiff reported interpersonal challenges and a history of not having friends. Tr. 554. Dr. Schultz did not cite to any objective evidence of

either cognitive or social limitations. This was a specific and legitimate reason to reject Dr. Schultz's opinion.

Second, the ALJ found Dr. Schultz's opinion is internally inconsistent. Tr. 31. Relevant factors to evaluating any medical opinion include the amount of relevant evidence that supports the opinion, the quality of the explanation provided in the opinion, and the consistency of the medical opinion with the record as a whole. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007); *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Moreover, a physician's opinion may be rejected if it is unsupported by the physician's treatment notes. *See Connett v. Barnhart*, 340 F.3d 871, 875 (9th Cir. 2003). The ALJ noted that while Dr. Schultz opined Plaintiff had impaired concentration, Plaintiff performed concentration tasks reasonably well on examination. Tr. 31. Plaintiff could not perform serial sevens and made an error on serial threes. Tr. 552. However, she spelled "world" correctly backward and forward and was able to follow a three-step command. *Id.* Here, Plaintiff's performance on the mental status examination does not demonstrate she is more restricted than already accounted for in the RFC. On examination, Plaintiff had a flat affect and reported not feeling anything, had abnormal abstract thinking, and could not complete serial threes or serial sevens correctly, but spelled "world" correctly forward and backward, followed a three-step command, she was cooperative, and had good grooming, normal speech,

orientation, memory, fund of knowledge. Tr. 552-53. The ALJ accounted for the limitations demonstrated in the examination by limiting Plaintiff to a routine and predictable environment that does not require her to independently evaluate her work performance or deal with hazards. *See* Tr. 21-22. Moreover, while Plaintiff demonstrated some abnormal results on testing, any error in finding Dr. Schultz's opinion was internally inconsistent is harmless because the ALJ gave other specific and legitimate reasons, supported by substantial evidence, to reject the opinion. *See Molina,* 674 F.3d at 1115

Third, the ALJ found Dr. Schutz's opinion is inconsistent with the longitudinal record. Tr. 31. An ALJ may discredit physicians' opinions that are unsupported by the record as a whole. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004). The ALJ found Dr. Schultz's opinion was inconsistent with the record as a whole, particularly Plaintiff's lack of mental health treatment. Tr. 31. Plaintiff argues she has received mental health treatment since June 2015 onward. ECF No. 14 at 9. However, while Plaintiff has had instances when she received counseling or medication management for a period of time, Plaintiff has had longer periods when she did not receive treatment.

In June 2015, Plaintiff was seen for a single visit during which she reported depression and anxiety and she was started on sertraline. Tr. 24, 371. In August 2016, Plaintiff was seen in the emergency department where she reported anxiety,

Tr. 519, and she was seen by her primary care physician, to whom she reported she had anxiety; Plaintiff was prescribed Buspirone but declined a counseling referral, Tr. 24 (citing Tr. 531). Later that month, Plaintiff reported her mood swings were worsening, Tr. 525, and Plaintiff then was seen for an initial mental health assessment, Tr. 25 (citing Tr. 536). Plaintiff's mental health records show she only received mental health counseling from August 2016 through October 2016. Tr. 564-92. In July 2017, Plaintiff's primary care provider started her on Paxil, and the next month Plaintiff reported Paxil was working well for her symptoms. Tr. 26 (citing Tr. 711). In November 2017, Plaintiff reported she had weaned herself off her medications and reported her depression was stable. Tr. 26 (citing Tr. 506). The next month, she was seen in the emergency department for a suicide attempt after a breakup. Tr. 26 (citing Tr. 629). She was then seen for follow-up appointments during which she was started on medication, Tr. 26 (citing Tr. 697, 699), and Plaintiff was encouraged to follow-up on the referral to Frontier Behavioral Health, Tr. 26 (citing Tr. 692), but there is no indication Plaintiff ever pursued the referral. Plaintiff also reported improvement in her symptoms with medication, Tr. 27 (citing Tr. 519-24, 704). The ALJ's conclusion that the longitudinal record did not support Dr. Schultz's opinions is supported by substantial evidence in the record, and constitutes a specific and legitimate reason to reject Dr. Schultz's opinion. The ALJ did not err in evaluating the opinion.

2. Dr. Rubin

In May 2018, Dr. Rubin, a non-examining medical expert, testified at Plaintiff's hearing regarding Plaintiff's functioning. Tr. 48-53. Dr. Rubin found Plaintiff has a depressive disorder and anxiety disorder. Tr. 50. Dr. Rubin opined Plaintiff could not perform complex tasks that require a lot of training, memory and capacity well; she could not handle a lot of stress or fast-paced work well; she should have limited contact with the public; and she should try to work in a routine slow-paced environment. Tr. 51. When asked if he agreed with Dr. Schultz's opinion that Plaintiff may have issues working with others and consistently attending work, Dr. Rubin stated Plaintiff may have issues with attendance, which may be related to motivation, but Dr. Schultz was guessing there might be some issues with Plaintiff attending work as well. Tr. 51. He stated he thinks Plaintiff should try to work. Tr. 52. He also opined Plaintiff has "some" concentration limitations. Tr. 53. The ALJ gave Dr. Rubin's opinion great weight. Tr. 28. As Dr. Rubin is a non-examining source, the ALJ must consider the opinion and whether it is consistent with other independent evidence in the record. *See* 20 C.F.R. § 416.927(b),(c)(1); *Tonapetyan,* 242 F.3d at 1149; *Lester*, 81 F.3d at 830-31.

Plaintiff argues the ALJ improperly rejected Dr. Rubin's opinion because she gave the opinion less than full weight, did not incorporate all of the limitations

into the RFC, and did not provide an explanation for the rejection. ECF No. 14 at 6. Plaintiff contends Dr. Rubin gave a disabling opinion, as he opined Plaintiff might have consistency issues with work attendance, and the vocational expert testified that an individual who misses work more than once per month is not competitively employable. *Id.* However, Plaintiff's argument is inconsistent with the record.

Dr. Rubin opined Plaintiff may have some motivation issues with working, and stated he agreed Plaintiff might have attendance issues but also stated Dr. Schultz was guessing Plaintiff "might" have difficulty consistently showing up for work. Tr. 51-52. Dr. Rubin further stated Plaintiff should try to work, and he thinks she could succeed at simple work with limited public contact. *Id.* When asked to quantify Plaintiff's limitations such as with a percentage, Dr. Rubin declined. Tr. 53. As such, Dr. Rubin did not give an opinion as to how frequently Plaintiff would consistently miss work, if at all, nor did he opine that any of Plaintiff's limitations would be work preclusive. In fact, he opined Plaintiff should work. As the ALJ incorporated Dr. Rubin's opinion into the RFC, the ALJ did not error in considering Dr. Rubin's opinion.

3. Dr. Brown and Dr. Gilbert

In September 2016, Dr. Brown, a State agency psychological consultant, found Plaintiff has an affective disorder and an anxiety disorder. Tr. 77. Dr.

Brown opined Plaintiff had no more than moderate limitations in any area of functioning. Tr. 80-81. Dr. Brown stated, "[Plaintiff] retains the ability to engage in at least two hours of work activity of an eight hour workday," she should avoid working with the general public, and she is capable of adapting to simple changes. Tr. 81.

In November 2016, Dr. Gilbert, a State agency psychological consultant, also opined Plaintiff has no more than moderate limitations, Tr. 96-97, and opined Plaintiff "would have occasional difficulties in maintaining attention, concentration, pace & persistence" when symptomatic, but Plaintiff "remains capable of simple tasks," she has reasonable concentration, persistence and pace, can attend work within customary tolerances, work within a routine and complete a normal workday/workweek; she is capable of work with limited social interactions away from the general public and she may have occasional difficulty accepting criticism or appropriately dealing with coworker conflict, but she can accept instructions and maintain adequate hygiene; and she remains capable of adapting within a work environment. Tr. 97-98. The ALJ gave Dr. Brown's and Dr. Gilbert's opinions great weight. Tr. 28. As Dr. Brown and Dr. Gilbert are non-examining sources, the ALJ must consider the opinions and whether they are consistent with other independent evidence in the record. *See* 20 C.F.R. § 416.927(b),(c)(1); *Tonapetyan,* 242 F.3d at 1149; *Lester*, 81 F.3d at 830-31.

Plaintiff argues the ALJ improperly rejected Dr. Brown's and Dr. Gilbert's opinions because she gave the opinions less than full weight, did not incorporate all of the limitations into the RFC, and did not provide an explanation for the rejection. ECF No. 14 at 6. Plaintiff contends Dr. Brown gave a disabling opinion, as he opined Plaintiff can perform work activities for at least two hours per day, which Plaintiff argues is equivalent to opining Plaintiff can only work part-time, which would be a disabling limitation. *Id.* at 5. However, Plaintiff's argument is inconsistent with the evidence because Dr. Brown stated Plaintiff is capable of performing "at least" two hours of activities, he found Plaintiff had no more than moderate limitations, Tr. 80-81, and found Plaintiff is not disabled, Tr. 83. After reviewing the initial evidence and determination, Dr. Gilbert opined Plaintiff was capable of completing a normal workday and workweek. Tr. 97. As such, the ALJ incorporated Dr. Brown's opinion into the RFC and did not error in her consideration of the opinion.

Next, Plaintiff argues Dr. Gilbert's opinion was disabling because he opined Plaintiff would have occasional difficulties with concentration, persistence and pace when symptomatic and she would have occasional difficulties accepting criticism. ECF No. 14 at 5. Plaintiff argues the opinion is consistent with finding Plaintiff would have the difficulties up to one-third of day, which would be disabling due to the vocational expert's testimony that an individual can only be

off-task ten percent of the day. *Id.* at 6. This argument is also inconsistent with the evidence. While Dr. Gilbert opined Plaintiff would have occasional difficulties with concentration, persistence and pace, he clarified such difficulties would only occur while Plaintiff is symptomatic and gave no indication how frequently Plaintiff is expected to be symptomatic. Tr. 97. However, Dr. Gilbert opined Plaintiff is capable of sustaining competitive employment, indicating the occasional difficulties would not rise to the level to prevent employment. *Id.* Where evidence is subject to more than one rational interpretation, the ALJ's conclusion will be upheld. Burch, 400 F.3d at 679. As such, the ALJ properly incorporated Dr. Gilbert's opinion into the RFC and did not error in considering the opinion.

B. Step-Three

Plaintiff contends the ALJ erred in finding Plaintiff's migraine headaches do not equal Listing 11.02. ECF No. 14 at 10-12. At step three, the ALJ must determine if a claimant's impairments meet or equal a listed impairment. 20 C.F.R. § 416.920(a)(4)(iii). The Listing of Impairments "describes each of the major body systems impairments [which are considered] severe enough to prevent an individual from doing any gainful activity, regardless of his or her age, education or work experience." 20 C.F.R. § 416.925. "Listed impairments are purposefully set at a high level of severity because 'the listings were designed to

operate as a presumption of disability that makes further inquiry unnecessary.' " *Kennedy v. Colvin*, 758 F.3d 1172, 1176 (9th Cir. 2013) (citing *Sullivan v. Zebley*, 493 U.S. 521, 532 (1990)). "Listed impairments set such strict standards because they automatically end the five-step inquiry, before residual functional capacity is even considered." *Kennedy*, 758 F.3d at 1176. If a claimant meets the listed criteria for disability, she will be found to be disabled. 20 C.F.R. § 416.920(a)(4)(iii).

"To *meet* a listed impairment, a claimant must establish that he or she meets each characteristic of a listed impairment relevant to his or her claim." *Tackett,* 180 F.3d at 1099 (emphasis in original); 20 C.F.R. § 416.925(d). "To *equal* a listed impairment, a claimant must establish symptoms, signs and laboratory findings 'at least equal in severity and duration' to the characteristics of a relevant listed impairment . . . ." *Tackett*, 180 F.3d at 1099 (emphasis in original) (quoting 20 C.F.R. § 404.1526(a)); 20 C.F.R. § 416.926(a). "If a claimant suffers from multiple impairments and none of them individually meets or equals a listed impairment, the collective symptoms, signs and laboratory findings of all of the claimant's impairments will be evaluated to determine whether they meet or equal the characteristics of any relevant listed impairment." *Tackett*, 180 F.3d at 1099. However, " '[m]edical equivalence must be based on medical findings,' " and " '[a] generalized assertion of functional problems is not enough to establish

disability at step three.' " *Id*. at 1100 (quoting 20 C.F.R. § 404.1526(a)); 20 C.F.R. § 416.926(a).

The claimant bears the burden of establishing her impairment (or combination of impairments) meets or equals the criteria of a listed impairments. *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005). "An adjudicator's articulation of the reason(s) why the individual is or is not disabled at a later step in the sequential evaluation process will provide rationale that is sufficient for a subsequent reviewer or court to determine the basis for the finding about medical equivalence at step 3." Social Security Ruling (SSR) 17-2P, 2017 WL 3928306, at *4 (effective March 27, 2017).

Here, the ALJ concluded that Plaintiff's impairments and combinations of impairments did not meet or equal any listings. Tr. 19. The ALJ stated Plaintiff's impairments did not meet or equal "Listing 11.00 (Neurological)" although 11.00 is not a listing but rather a category of listings. *Id.* The ALJ provided an explanation as to why Plaintiff's impairments did not meet or equal the other relevant listings but did not provide an explanation as to why Plaintiff's impairments do not meet or equal a neurological listing, including Listing 11.02. *Id.*

While Listing 11.02 addresses seizures, it is the most closely analogous listing for migraines. HALLEX DI 24505.015(B)(7)(B) (Ex. 2). Listing 11.02

requires migraine headaches be "documented by detailed description of a typical [migraine headache], including all associated phenomena." 20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 11.02. To be of equal severity and duration, Listing 11.02B requires the migraines occur at least once a week for at least three consecutive months, despite compliance with treatment. *Id.*

Plaintiff has not met her burden in demonstrating her migraines are equal in severity to Listing 11.02. Plaintiff alleges she has had headaches on an almost daily basis. ECF No. 14 at 10 (citing Tr. 289, 536). However, Plaintiff cites to her Disability Report and a counseling appointment where Plaintiff self-reported daily migraines. At the counseling appointment, Plaintiff did not report taking any medications for her migraines. Tr. 536. Similarly, in the Disability Report, Plaintiff did not report any treatment for her migraines. Tr. 291-93. Plaintiff also cites to other records in support of the argument she had chronic headaches from August 2016 through December 2016, but the documents are either based entirely on Plaintiff's self-report during periods she was not seeking treatment for her headaches, Tr. 270 (Plaintiff's headache questionnaire); Tr. 289, 299 (Plaintiff's Disability Reports); or medical records from periods when Plaintiff was not seeking care for her headaches and was not taking medications for the reported headaches, Tr. 536, 544, 565, 647.

While migraines are occasionally listed in Plaintiff's past medical history or problem list, Tr. 453, 565, there are minimal discussions of her migraine headaches in the treatment records. Medical records indicate Plaintiff consistently reported not experiencing headaches. Tr. 392, 456, 499, 629, 633. Plaintiff reported at her physical consultative examination that she went to an emergency room once approximately 18 months prior to the examination due to her headaches and did not report any further treatment. Tr. 544. The examiner diagnosed Plaintiff with a "history of headaches consistent with muscle tension headaches" and stated the prognosis was "good." Tr. 547. At an appointment for her sleep issues, Plaintiff reported "occasional headaches." Tr. 647. There is no objective evidence that Plaintiff has experienced weekly headaches, nor that Plaintiff has had any treatment for her headaches. As such, Plaintiff has not met her burden in demonstrating she equals Listing 11.02 and any error in the ALJ's analysis at step three would be harmless. *See Molina,* 674 F.3d at 1115.

C. Plaintiff's Symptom Claims

Plaintiff faults the ALJ for failing to rely on reasons that were clear and convincing in discrediting her symptom claims. ECF No. 14 at 13-21. An ALJ engages in a two-step analysis to determine whether to discount a claimant's testimony regarding subjective symptoms. SSR 16–3p, 2016 WL 1119029, at *2. "First, the ALJ must determine whether there is objective medical evidence of an

underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted). "The claimant is not required to show that [the claimant's] impairment could reasonably be expected to cause the severity of the symptom [the claimant] has alleged; [the claimant] need only show that it could reasonably have caused some degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

Second, "[i]f the claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the claimant's testimony about the severity of the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations omitted). General findings are insufficient; rather, the ALJ must identify what symptom claims are being discounted and what evidence undermines these claims. *Id*. (quoting *Lester*, 81 F.3d at 834; *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently explain why it discounted claimant's symptom claims)). "The clear and convincing [evidence] standard is the most demanding required in Social Security cases." *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm'r of Soc. Sec. Admin*., 278 F.3d 920, 924 (9th Cir. 2002)).

Factors to be considered in evaluating the intensity, persistence, and limiting effects of a claimant's symptoms include: 1) daily activities; 2) the location,

duration, frequency, and intensity of pain or other symptoms; 3) factors that precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and side effects of any medication an individual takes or has taken to alleviate pain or other symptoms; 5) treatment, other than medication, an individual receives or has received for relief of pain or other symptoms; 6) any measures other than treatment an individual uses or has used to relieve pain or other symptoms; and 7) any other factors concerning an individual's functional limitations and restrictions due to pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. § 416.929 (c). The ALJ is instructed to "consider all of the evidence in an individual's record," to "determine how symptoms limit ability to perform work-related activities." SSR 16-3p, 2016 WL 1119029, at *2.

The ALJ found that Plaintiff's medically determinable impairments could reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's statements concerning the intensity, persistence, and limiting effects of her symptoms were not entirely consistent with the evidence. Tr. 22, 26.

1. Inconsistent Objective Evidence

The ALJ found Plaintiff's symptom claims are inconsistent with the objective evidence. Tr. 26. An ALJ may not discredit a claimant's symptom testimony and deny benefits solely because the degree of the symptoms alleged is not supported by objective medical evidence. *Rollins v. Massanari*, 261 F.3d 853,

857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989); *Burch*, 400 F.3d at 680. However, the objective medical evidence is a relevant factor, along with the medical source's information about the claimant's pain or other symptoms, in determining the severity of a claimant's symptoms and their disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. § 416.929(c)(2).

The ALJ noted that while Plaintiff alleges difficulty moving due to hip pain, the objective evidence is inconsistent with her allegation. Tr. 26. Imaging of Plaintiff's hip showed no fracture, dislocation, subluxation or abnormal joint spacing. *Id.* (citing Tr. 691). Plaintiff's physical examinations were also generally normal. Tr. 26 (citing Tr. 545-47, 614-44). Plaintiff argues the objective evidence is consistent with her reported symptoms and limitations. ECF No. 14 at 15. However, the ALJ reasonably found the objective evidence as a whole does not support Plaintiff's allegations of disabling limitations due to her hip pain. Further, as discussed *supra,* the objective evidence also does not support Plaintiff's allegations of daily headaches. While Plaintiff alleges ongoing limitations due to mental health symptoms, Plaintiff did not routinely seek mental health treatment, and reported improvement with mental health medications before choosing to wean herself off the medication. Tr. 26 (citing Tr. 704, 706). Plaintiff argues the ALJ erred in finding her allegations of concentration issues inconsistent with Dr.

Schultz's examination, as the examination demonstrated abnormal findings. ECF No. 14 at 18. While Plaintiff demonstrated some impairment in concentration on testing, such as errors in serial sevens, she was able to spell "world" correctly forward and backward and she was able to follow three-step instructions. Tr. 552.

On this record, the ALJ reasonably concluded that the objective medical evidence is not consistent with Plaintiff's complaints of disabling symptoms. This finding is supported by substantial evidence and was a clear and convincing reason, coupled with the other reasons offered, to discount Plaintiff's symptoms complaints

2. Activities of Daily Living

The ALJ found Plaintiff's symptom claims are inconsistent with her activities of daily living. Tr. 26-27. The ALJ may consider a claimant's activities that undermine reported symptoms. *Rollins*, 261 F.3d at 857. If a claimant can spend a substantial part of the day engaged in pursuits involving the performance of exertional or non-exertional functions, the ALJ may find these activities inconsistent with the reported disabling symptoms. *Fair*, 885 F.2d at 603; *Molina*, 674 F.3d at 1113. "While a claimant need not vegetate in a dark room in order to be eligible for benefits, the ALJ may discount a claimant's symptom claims when the claimant reports participation in everyday activities indicating capacities that are transferable to a work setting" or when activities "contradict claims of a totally

debilitating impairment." *Molina*, 674 F.3d at 1112-13. The ability to care for others without help has been considered an activity that may undermine claims of totally disabling pain. *Rollins,* 261 F.3d at 857. However, if the care activities are to serve as a basis for the ALJ to discredit the Plaintiff's symptom claims, the record must identify the nature, scope, and duration of the care involved and this care must be "hands on" rather than a "one-off" care activity. *Trevizo v. Berryhill*, 871 F.3d 664, 675-76 (9th Cir. 2017).

The ALJ noted Plaintiff was able to climb a flight of stairs at her home, drive for 60 to 90 minutes before needing a break to stretch, she could perform household chores, and care for multiple animals. Tr. 27 (citing Tr. 545). Plaintiff also reported being able to handle her personal care without assistance and lifting and carrying at least 50 pounds as that is the weight of the animal food she carries. Tr. 545. Plaintiff stated she spends most of her day caring for a dog, six rabbits, and four cats. *Id.* The ALJ also noted Plaintiff was engaged, able to use social media, and frequently attended medical appointments. Tr. 27. Plaintiff further reported spending her days taking her mother's fiancé to his appointments and providing care for her infant brother. Tr. 556. Plaintiff argues her activities were not inconsistent with her claims, as she later moved to a trailer with no stairs, rarely left her home, and had low motivation to complete tasks. ECF No. 19-20. However, the ALJ reasonably found Plaintiff's activities, including driving for up

to 90 minutes at a time and caring for 11 animals, were inconsistent with a claim of disabling limitations. This was a clear and convincing reason, supported by substantial evidence, to reject Plaintiff's symptom claims.

3. Lack of Treatment

The ALJ found Plaintiff's symptom claims are inconsistent with her lack of treatment. Tr. 27. An unexplained, or inadequately explained, failure to seek treatment or follow a prescribed course of treatment may be considered when evaluating the claimant's subjective symptoms. *Orn*, 495 F.3d at 638. Evidence of a claimant's self-limitation and lack of motivation to seek treatment are appropriate considerations in determining the credibility of a claimant's subjective symptom reports. *Osenbrock v. Apfel*, 240 F.3d 1157, 1165-66 (9th Cir. 2001); *Bell-Shier v. Astrue*, 312 F. App'x 45, *3 (9th Cir. 2009) (unpublished opinion) (considering why plaintiff was not seeking treatment). When there is no evidence suggesting that the failure to seek or participate in treatment is attributable to a mental impairment rather than a personal preference, it is reasonable for the ALJ to conclude that the level or frequency of treatment is inconsistent with the alleged severity of complaints. *Molina*, 674 F.3d at 1113-14. But when the evidence suggests lack of mental health treatment is partly due to a claimant's mental health condition, it may be inappropriate to consider a claimant's lack of mental health

treatment when evaluating the claimant's failure to participate in treatment. *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996).

The ALJ found that while Plaintiff alleges disabling mental health symptoms, she has received very limited mental health treatment. Tr. 26. The ALJ considered Plaintiff's explanation that she lacked insurance and transportation for a period for time, but the ALJ noted Plaintiff routinely sought treatment for her physical treatments and therefore found Plaintiff's explanation regarding her lack of mental health treatment was not valid. Plaintiff argues she sought counseling and mental health medication, but as discussed *supra,* while Plaintiff has had instances when she received counseling or medication management for a period of time, Plaintiff has had longer periods when she did not receive treatment. Plaintiff further argues she avoided counseling to avoid thinking about her history of abuse, however the records indicate Plaintiff was able to overcome her avoidance to complete assignments when she did attend counseling. Tr. 583. On this record, the ALJ reasonably concluded that Plaintiff's lack of treatment is not consistent with Plaintiff's complaints of disabling symptoms. This finding is supported by substantial evidence and was a clear and convincing reason to discount Plaintiff's symptoms complaints

Plaintiff contends the ALJ erred by not including limitations in the RFC that account for Plaintiff's migraine triggers and symptoms. ECF No. 14 at 12-13. As

the ALJ gave clear and convincing to reject Plaintiff's symptom complaints, and there was no objective evidence to support Plaintiff's reported frequency or severity of headaches, as discussed *supra,* the ALJ did not error in crafting an RFC that does not include limitations to account for Plaintiff's reported limitations due to her headaches. Plaintiff is not entitled to remand on these grounds.

D. Record Development

Plaintiff contends the ALJ erred in failing to order a psychological consultative examination. ECF No. 14 at 21. The ALJ has an independent duty to fully and fairly develop a record in order to make a fair determination as to disability, even where, as here, the claimant is represented by counsel. *Celaya v. Halter*, 332 F.3d 1177, 1183 (9th Cir. 2003); *see also Tonapetyan*, 242 F.3d at 1150; *Crane v. Shalala*, 76 F.3d 251, 255 (9th Cir. 1996). "Ambiguous evidence, or the ALJ's own finding that the record is inadequate to allow for proper evaluation of the evidence, triggers the ALJ's duty to 'conduct an appropriate inquiry.'" *See Tonapetyan*, 242 F.3d at 1150 (quoting *Smolen*, 80 F.3d at 1288).

"An ALJ is not required to order every medical evaluation that could conceivably shed light on a claimant's condition, but rather just those that would resolve ambiguities or inadequacies in the record." *Lloyd v. Astrue*, No. C-11-4902-EMC, 2013 WL 503389, at *5 (N.D. Cal. Feb. 8, 2013) (citing *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001)). Plaintiff's disagreement with

the ALJ's conclusions does not make the record ambiguous or inadequate. *See Leitner v. Comm'r Soc. Sec.*, 361 F. App'x 876, 877 (9th Cir. 2010) (the "claimant bears the burden" of establishing that symptoms interfere with his or her ability to "perform basic work activities," and the ALJ, on that record, could make such a determination) (citations omitted).

Plaintiff last attended a psychological consultative examination in September 2016. Tr. 550-54. At the December 2018 hearing, Dr. Rubin opined a more current psychological consultative examination would be helpful in determining Plaintiff's present functioning. Tr. 50. Plaintiff's counsel requested the ALJ order a psychological consultative examination. Tr. 68. The ALJ denied the request, stating there was sufficient evidence in the record to make a determination that Plaintiff is not disabled and that Plaintiff should seek full-time employment. Tr. 68.

The last full mental status examination in the record is from December 2017, when Plaintiff presented with an abnormal mental status after a suicide attempt. Tr. 630. Plaintiff's mother reported the events were based solely on a recent breakup. Tr. 630-31. At a follow-up appointment, Plaintiff had a flat affect, poor eye contact and visible self-inflicted wounds on her wrist. Tr. 699. Plaintiff's additional appointments through 2017 and the beginning of 2018 do not contain mental status examinations though they also do not contain any objective evidence

of abnormal mental health findings. Tr. 686-96. In January 2018, Plaintiff reported her depression was not optimally controlled and she increased her medication on her own. Tr. 690. In February 2018, Plaintiff reported improvement with her medication increase though still not optimally controlled symptoms, but the provider noted it had only been two weeks since the medication increase. Tr. 686, 688. Plaintiff was encouraged multiple times to follow through with her referral for psychiatric care, Tr. 688, 692, and there is no evidence she did so.

While Plaintiff argues the record was inadequate to make a determination and a consultative examination was necessary, the ALJ found there was sufficient evidence on which to make a decision. Plaintiff does not set forth an argument that the evidence is ambiguous. Although the last consultative examination took place over a year prior to the hearing, and Plaintiff's most recent mental status examination was abnormal, the records demonstrate improvement since the last examination. As discussed *supra,* Plaintiff reported improvement with medication and she did not follow-up on a psychiatric referral despite multiple reminders to do so. The ALJ also had the opinions of the medical consultants and the medical expert on which to base her opinion. ECF No. 15 at 19 (citing Tr. 46-54, 80-82, 96-98). As such, the ALJ did not error in declining to order a psychological consultative examination. Plaintiff is not entitled to remand on these grounds.

CONCLUSION

Having reviewed the record and the ALJ's findings, the Court concludes the ALJ's decision is supported by substantial evidence and free of harmful legal error. Accordingly, **IT IS HEREBY ORDERED**:

1. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.

2. Defendant's Motion for Summary Judgment, **ECF No. 16**, is **GRANTED**.

3. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.

The District Court Executive is directed to file this Order, provide copies to counsel, and **CLOSE THE FILE**.

DATED June 2, 2020.

s/Mary K. Dimke
MARY K. DIMKE
UNITED STATES MAGISTRATE JUDGE